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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1060

MARK METZGER and JOHN CLEMENTS,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

Mark Metzger and John Clements seek certiorari to review an order of the Court of Appeals of the State of New York, entered October 28, 1975. That Court reversed, by a divided court, an order of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, rendered March 11, 1975,

which order had reversed a judgment of the County Court of Nassau County, rendered May 21, 1973. The County Court had convicted each of the petitioners, upon pleas of guilty after the denial of a motion to suppress seized physical evidence, of the crime of selling a dangerous drug in the fourth degree and had sentenced each to a period of up to three years' imprisonment.

Jurisdiction

The petition for certiorari was filed on or about January 29, 1976. The petitioner invokes this Court's jurisdiction on certiorari pursuant to 28 U.S.C. §1257(3).

The Opinions Below

The opinion of the New York Court of Appeals appears at 37 N.Y.2d 675, —— N.E.2d ——, 376 N.Y.S.2d 480 (1975).* The Appellate Division's opinion appears at 44 A.D.2d 572, *remittitur amended* 45 A.D.2d 719, *remittitur further amended* 44 A.D.2d 733 (1974). The Trial Court's decision is not reported.

Question Presented

Whether the police acted reasonably in effecting an immediate warrantless entry of the petitioners' apartment for the purpose of arresting them for the sale of drugs, and seizing the stock of drugs reasonably known to be in a bedroom dresser drawer in that apartment.

* The opinion is reproduced in the petition for certiorari at pp. 1a-28a.

Statement of the Case

The issue which concerned the New York appellate courts, and which is advanced as grounds for certiorari relief, was the constitutional validity of the seizure of certain marijuana from the apartment occupied by petitioners at the time of their arrest.* The facts of this event, which were not disputed on appeal, were summarized in the following manner by the New York Court of Appeals:**

"A named informer, apparently previously unknown to the police, but identified and still available, told officers with whom he was conversing that he knew where large quantities of marijuana could be purchased. When asked to do so the informer agreed to make a buy for the police. En route to the specified apartment, the informer further told the officers that bricks of marijuana were kept in the bottom drawer of a dresser in the apartment and described the precise location of that dresser.

"On arriving at the apartment house, the officers searched the informer and then supplied him with a marked $5 bill. The informer proceeded to defendants' apartment, returning five to eight minutes later with three marijuana

* The case also presented an issue of petitioners' standing to challenge the validity of the seizure, for the petitioners pleaded guilty to selling drugs to the informant, and not to criminal possession of the drugs at issue herein. The New York Court of Appeals did not reach this issue but chose instead to rule on the merits.

** The petitioners have filed a motion for post-conviction relief in the County Court of Nassau County pursuant to New York Criminal Procedure Law §440.10. That motion does challenge the underlying facts of this case, for petitioners there allege that the police officers lied about the nature of the information supplied to them by the informer. This motion is currently being litigated.

cigarettes. He told the officers that he bought only three cigarettes because the sellers began questioning him. At that he became nervous and when defendants left the room the informer left the apartment.

"The police went to the apartment. When defendant Clements opened the door he was forthwith arrested and handcuffed. The arresting officers saw marijuana in a blue bowl, as the informer had told them they would, together with cigarette paper, a scale and various types of pipes, all in plain view. Defendant Metzger was located in a bathroom down the hall, arrested and handcuffed.

"The officers then proceeded directly to a rear bedroom and to the dresser which had been described by the informer. On opening its bottom drawer they found 16 bricks of marijuana, again exactly as the informer had predicted, together with various bags of clear plastic containing marijuana. Examination of the top drawer of the same dresser revealed some 20 barbiturates with a few bags of marijuana and more cigarette paper. There was also a balance scale on top of the dresser."

ARGUMENT

The police seizure of drugs from a known location inside an apartment, which they had lawfully entered to arrest petitioners for a drug sale, does not, under the unique circumstances here presented, either offend the Constitution or present an issue justifying this Court's exercise of certiorari jurisdiction [answering the petition].

The facts of the police conduct which forms the question presented by the petition for certiorari were well established and concisely set forth by the New York Court of Appeals. However, the petitioners grossly misstate these facts.

The correct events may be briefly summarized. The police met a previously unknown informant who told them that he knew where large quantities of marijuana could be purchased. He agreed to "make a buy" for the police. He was driven to the apartment where he claimed the drugs could be obtained. En route, he told the police that bricks of marijuana were kept in the bottom drawer of a certain dresser in the back bedroom of that apartment. On arrival at the apartment building, the officers searched the informer and supplied him with a marked $5 bill. He went inside and returned a few minutes later with three marijuana cigarettes. The officers questioned him. The informer indicated that the sellers had themselves questioned him and that he, the informer, was nervous and believed that the sellers "might have become suspicious of what was afoot."

The officers went to the apartment. When petitioner John Clements opened the door, he was arrested and handcuffed in the living room. The police then saw and seized a small quantity of marijuana in a bowl in plain view in this room, just as the informer had described to them. Cigarette paper, a scale and various pipes were also in plain view. Petitioner Mark Metzger at this time was in a bathroom down the hall. He was arrested there, handcuffed, and escorted to the living room.

The officers then went to the bedroom and opened the drawer which had been pinpointed by the informer as the source of the marijuana. Inside, they found 16 bricks of marijuana.*

The police conduct herein falls into two essential stages for purposes of constitutional review. The first stage concerns the propriety of the police's entry into the apartment, arrest of the petitioners, and seizure of the small quantity of marijuana located in the glass bowl. The second stage is concerned with the legality of the seizure of the larger quantity of marijuana found in the dresser drawer.

The first stage presents no complex or novel problem. The police clearly had reasonable cause to make the initial warrantless entry, because of the imminent danger that the informer had been unmasked, which of course would have led to the immediate destruction or transportation of the drugs and the escape of the sellers. *United States* v. *Curran*, 498 F.2d 30 (9th Cir. 1974); *United States* v. *Blake*, 484 F.2d 50 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974); *United States* v. *Bustamente-Gomez*, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *United States* v. *Rubin*, 474 F.2d 262 (3rd Cir.), *cert. denied, sub nom. Agran* v. *United States*, 414 U.S. 833 (1973); *United States* v. *Lozaw*, 427 F.2d 911 (2d Cir. 1970). *See Vale* v. *Louisiana*, 399 U.S. 30, 39 (1970) (dissenting opinion of Mr. Justice Black) and cases cited therein.* *See also* Anno. 6 A.L.R. Fed. 724. And, once lawfully inside the apartment, the police could properly seize the small quantity of marijuana which was visible inside the glass bowl just beyond the apartment's doorway. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Similarly, the location and arrest of Metzger in a bathroom next to the bedroom was also proper.

* The facts set forth here are paraphrased directly from the opinion of the New York Court of Appeals, at 37 N.Y.2d 675, 676-77, 690, —— N.E.2d ——, 376 N.Y.S.2d 481-82, 494. This portion of the opinion appears at pp. 2a-3a, 24a of the petition.

These acts having been accomplished, the police then went to the dresser drawer wherein the informant had located the principal supply of drugs, opened it, and seized the contraband. This second stage conduct did not offend the constitution. The officers were presented with three alternatives. Initially they might have taken the petitioners into custody, left the apartment unguarded, and obtained a search warrant, hoping in the meantime that no one else would enter the apartment and disturb the drugs in the hours which it might take to procure a search warrant, and

* It might be noted that appellant's citation of *United States* v. *Cooks*, 493 F.2d 668 (1974), *cert. denied*, 420 U.S. 996 (1975) is not helpful. There, narcotics agents went to the door of a residence intending, as the court found, to make a "buy and bust." After an initial arrest of one of the occupants as the door was opened, the agents searched the whole house. The reviewing court held that the initial warrantless entry was dubious and the subsequent general search exceeded permissible constitutional limitations. Here, the initial intrusion was permissible and there was no subsequent general search.

that the arrestees would not obtain a speedy release and return before any warrant could be executed. In the words of Mr. Justice Black, "To have abandoned the search at this point and left the house with [an arrestee] would not have been the action of reasonable police officers." *Vale* v. *Louisiana, supra* at 38 (dissenting opinion).

Alternatively, the officers might have summoned assistance and then left the apartment under guard, either inside the apartment at the dresser or outside the apartment so as to restrict access to it. Later, after procuring a search warrant, the officers could then have returned and seized the drugs pursuant to the warrant.

The posting of a lookout has occasionally been suggested by a number of courts as an alternative to the making of an immediate warrantless entrance into unoccupied premises. *United States* v. *Jeffers,* 342 U.S. 48, 52 (1951); *United States* v. *Hayes,* 518 F.2d 675, 677 (6th Cir. 1975). Under these circumstances, this Court and the Sixth Circuit Court of Appeals held that the posting of a watch while a search warrant was obtained to enter the premises would have been constitutionally preferable to the immediate warrantless entry, which was ruled unlawful in each case. These cases, however, do not speak of the desirability of this police technique under the instant circumstances, where an initial intrusion is both justified and necessary.* *Compare United States* v. *Pino,* 431 F.2d 1043, 1045 (2d Cir. 1970), *cert.*

* One court has upheld the validity of the "lookout" technique in a warrantless entry situation. *State* v. *Miller,* 528 P.2d 1082 (Ore. App. 1974). (Occupants of entered apartment held in room under police guard while other officers obtained a warrant. Upon return, premises searched.)

denied 402 U.S. 989 (1971) (posting of a lookout where initial entry justified by exigent circumstances not necessary as a predicate to seizure of evidence inside the apartment).

The third alternative, and the one followed herein, is the immediate seizure of the narcotics from their known location. The Court of Appeals ruled that this technique represented a "fair and sensible balancing of the competing private and public interests." This conclusion was justified. As the Court of Appeals noted, "As a practical matter, the police [had they chosen to apply the 'lookout' technique] would have had to take possession of defendants' apartment including surely all means of ingress and egress. Any person entering or leaving this apartment would have had to have been at least stopped and probably then restrained. Control of the areas adjoining the dresser would have had to have been assured. In sum, this proposal would have entailed a much greater intrusion in both time and space than that to which defendants were actually subjected." Thus, it can hardly be argued that the constitution requires a greater intrusion over a lesser one, particularly where, as here, there is no difference in the ultimate practical result which each technique produces. *See Chambers* v. *Maroney,* 399 U.S. 42, 51-52 (1970).*

* "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

Moreover, it should be noted that the lookout method entails certain practical difficulties, such as the availability of police personnel, the possible danger to the guarding personnel, who of course cannot be sure who may demand entrance, and the scope of the restriction of possible entry over a perhaps lengthy period of time while a search warrant is procured. These difficulties have been judicially noted. *United States* v. *Pino, supra; United States* v. *Lozaw, supra,* 427 F.2d at 918 (concurring opinion of Chief Judge Lumbard). Thus, under these circumstances, where the officers had specific knowledge of the location of the drugs, the Court of Appeals' conclusion that their immediate seizure was constitutionally permissible was correct. *Accord, United States* v. *Pino, supra; State* v. *Wiley,* 522 S.W.2d 281, 292 (Mo. 1975).

Nothing in the holding of the Court of Appeals offends the rule enunciated by this Court in *Chimel* v. *California,* 395 U.S. 752 (1969). That case was concerned with the propriety of a search for potential evidence, the existence and specific location of which was unknown by the police at the time of valid entry for purposes of arrest. Of course, in that situation, the interposition of a warrant-issuing magistrate's judgment between the police and the premises serves the eminently legitimate function of protecting those premises from a far-ranging exploratory intrusion by the police in the absence of probable cause for that intrusion. *See Coolidge* v. *New Hampshire, supra* at 475-78. Thus, both the New York Court of Appeals and the Supreme Court of Missouri, which recently reached the same result on similar facts, have been careful to limit the rule enunciated in the instant situation to exclude justifying a police exploratory search or even a "rummaging" at a location

other than that specifically described by the informer. *People* v. *Clements,* 37 N.Y.2d at 684-85, —— N.E.2d ——, 376 N.Y.S.2d at 484; *State* v. *Wiley,* 522 S.W.2d 281, 292. Indeed, one court has specifically refused to expand *Wiley* to such a situation. *State* v. *Peterson,* 525 S.W.2d 599, 608 (Mo. Ct. App. 1975). Thus, *Chimel* was not, as petitioners would have it, constructively overruled by the Court of Appeals; rather, its holding was properly respected and interpreted in a rather unique factual circumstance. Indeed, the uniqueness of these circumstances alone makes it obvious that this case is inappropriate for the exercise of certiorari jurisdiction.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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